



DEPARTMENT OF THE ARMY
HEADQUARTERS UNITED STATES ARMY FORCES COMMAND
1777 HARDEE AVENUE SW
FORT MCPHERSON GEORGIA 30330-1062

AUG 31 1998

REPLY TO
ATTENTION OF

AFLG-PRO (715)

MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: Contracting Information Letter (CIL) 98-40, Freedom of Information Act (FOIA) Requests for Acquisition Information

1. References:

a. Freedom of Information Act, Title 5, United States Code, Section 552a;

b. DoD 5400.7-R, DOD Freedom of Information Act Program, May, 1997;

c. AR 25-55, The Department of the Army Freedom of Information Act Program, 14 Apr 97;

d. FAR 24.2, as supplemented by DFARS 224.4 and AFARS 24.2

e. Memorandum, HQ USTAPC, TAPC-PDR-PF, 20 Aug 97, subject: DoD Regulation 5400.7, "DoD Freedom of Information Act (FOIA) Program," DoD Supplemental Reporting Instructions, and Guidance from Attorney General Janet Reno (Encl 1)

2. This CIL supersedes CIL 96-26, Guidance on Release of Freedom of Information Act (FOIA) Requests. It provides revised FORSCOM policy on the processing and review of FOIA requests for acquisition information received by FORSCOM installations and activities. (Note also that, IAW with ref i.e., FOIA requests are to be processed IAW with ref. 1b until AR 25-55 is revised.)

3. The contacting officer is the primary decision-maker on the release of contracting records and documents. There is no "litmus" or "bright line" test that automatically renders information non-disclosable. The proper approach is to consider

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all information which is responsive to the FOIA request as potentially releasable, and then perform the appropriate analysis to determine if partial or complete withholding is in the government's best interests and is consistent with law.

4. Exemption 4 of the FOIA (5 U.S.C. 552(b)(4)) provides the most likely basis for withholding contracting information. It protects "trade secrets and commercial or financial information obtained from a person and privileged or confidential."

a. Generally speaking, a trade secret is a secret, commercially valuable plan, process, or device used in the making, preparing, or processing of trade commodities that can be said to be the end product of innovation or substantial effort. Very few requests (if any) will be in this category.

b. Most requests for acquisition information come within the category of "Commercial or Financial Information Obtained from a Person Which Is Privileged or Confidential." "Commercial or financial information" means information that relates to trade or business. The term "person" includes entities such as corporations, partnerships, and sole proprietorships, as well as actual persons. It is the determination of whether the requested material is "privileged or confidential information" that is difficult. For contract bids and proposals, the analysis must focus on whether disclosure is likely to impair the Government's ability to obtain similar necessary information in the future, or if disclosure is likely to cause substantial competitive harm to the entity from which the information was obtained.

(1) On the impairment question, it is the government, not the submitter that makes the determination; it is unlikely, though that the possibility of release of acquisition information would mean that businesses would not want the government's business (or money).

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(2) In making the determination as to the likelihood that release will cause competitive harm, the request must be referred to the submitter of the information (usually, the incumbent contractor) to present any objections concerning the release, unless it is clear that there cannot be a valid basis for objection.

5. The following is a suggested approach to the review and analysis of FOIA requests, and any response from the submitter of the information.

a. The goal is to prepare an accurate, complete, and thorough file (the administrative record) with documentation for each FOIA request. It is the local custodian's responsibility to analyze the FOIA request and make a determination (with supporting documentation) whether to release the information requested or recommend withholding the information; obtain legal review of that determination; and, when appropriate, prepare a comprehensive decision with supporting documentation and justification for FORSCOM review as the IDA.

b. If the submitter objects to release of the information, the submitter must provide specific reasons why a release of the requested information likely would harm its competitive position; mere speculation concerning harm or a bare assertion that "harm will occur" is not adequate. A suggested format for notifying submitters is enclosed (encl 2). Furthermore, it is important for the administrative record that these objections come from the submitter; the contracting officer should never assume that the submitter will object.

c. The contracting officer must carefully review the FOIA request; the reply, if any, from the submitter; and the appropriate FOIA provisions to determine if release of the information is appropriate. Input from technical experts, particularly a cost/pricing analyst, may be necessary to evaluate the validity of any claimed competitive harm. Forward the proposed response and copies of the records recommended for denial to the Principal Assistant Responsible for Contracting for release.

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See AFARS 24.202 for additional information. After making a decision, the contracting officer must obtain local legal review of the FOIA file.

d. The legal review should be similarly complete and accurate. Discussion of applicable case law may be warranted, particularly for more complex or novel requests. The legal review should not merely concur or non-concur with the contracting officer's proposed decision, but also must set out the precise bases for determining whether that decision is legally sufficient. A good starting point is the Department of Justice's *Freedom of Information Act Guide and Privacy Act Overview*, published annually. It is the most comprehensive ready-reference source for case law and discussion of the FOIA, applicable exemptions and related issues. In addition, the Department of Justice publishes the *FOIA Update* and maintains a website at www.usdoj.gov/foia.

e. If the contracting officer believes that any requested records or documents should be withheld, the complete FOIA file with legal review must be forwarded to the IDA. Forward the proposed response and copies of the records recommended for denial (with copies of the records in both unredacted and redacted versions) to the Principal Assistant Responsible for Contracting for release. The proposed response shall conclude with a paragraph worded substantially as follows: "You may appeal, in whole or part, denial to the Secretary of the Army. In the event you decide to appeal, your letter of appeal should be sent within 60 days of the date of this denial letter. Send the appeal through Headquarters, Forces Command, ATTN: AFLG-PR, Fort McPherson, GA 30330-1062, to the Office of the Secretary of the Army, Pentagon, ATTN: Office of the General Counsel, FOIA Appeal, Washington, DC 20310-0105. This denial is made on behalf of the Initial Denial Authority, the Assistant Secretary of the Army (Research, Development and Acquisition) by the undersigned."

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6. The FORSCOM Staff Judge Advocate has prepared a brief review of examples of contracting information commonly requested under FOIA. This analysis is set out at encl 3.

7. The Electronic FOIA (E-FOIA):

a. Pending Agency guidance for implementation, all Directors of Contracting are encouraged to use the homepage for publication of indexes of records that have been released under FOIA and are likely to be requested again. Such posting will be in sync with the statutory mandate upon Agency for electronic publication. We have identified some frequently requested FOIA documents and provide them as a guide (encl 4). However, these subsequent requests are not all inclusive and you are encouraged to add others as necessary.

b. On 2 October 1997, the E-FOIA Amendments of 1996 were signed into law to open access to releasable government information by the public. Under the E-FOIA amendments, E-mail is acknowledged as constituting a record and subject to the FOIA. However, not all e-mail is releasable. Guidance on handling e-mail is at encl 5 for your information. E-mail, which constitutes a record, should be evaluated like any other document requested under the FOIA.

8. The National Defense Authorization Act for 1997 created a statute (10 USC 2305g) that prohibits the release of a contractor's proposal if the proposal is not set forth or incorporated by reference into the contract between the agency and the contractor that submitted the proposal. This means that proposals not selected for award are exempt from release. The appropriate exemption is Exemption 3. The statute also protects proposals submitted by a successful offeror, provided that such a proposal is not actually set forth or incorporated by reference in the ensuing contract. Where the successful offeror's proposal is set forth or incorporated by reference in the contract, the Contracting Officer should conduct an Exemption 4 analysis, as outlined in paragraphs 4 and 5 above,

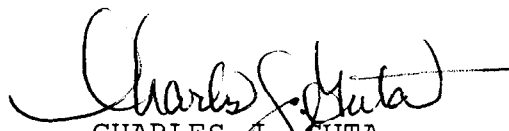
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to ascertain whether release of the information could cause substantial competitive harm to the offeror or impair the Government's ability to obtain similar necessary information in the future.

9. For additional information, please call Julie Grace,
DSN 367-5690.

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as



CHARLES J. GUTA

Colonel, AC

Chief, Contracting Division, DCSLOG
Principal Assistant Responsible
for Contracting



DEPARTMENT OF THE ARMY
U.S. TOTAL ARMY PERSONNEL COMMAND
ALEXANDRIA, VA
22331-0470



REPLY TO
ATTENTION OF

TAPC-PDR-PF (25)

20 AUG 1997

MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: DoD Regulation 5400.7-R, "DoD Freedom of Information Act (FOIA) Program,"
DoD Supplemental Reporting Instructions, and Guidance from the Attorney General Janet Reno

1. The purpose of this memorandum is three-fold. The first is to provide a copy of the revised DoD Regulation 5400.7-R, "DoD Freedom of Information Act (FOIA) Program," dated 22 May 97, establishing the latest policy and providing procedural guidance concerning changes in the FOIA Program. The second is to provide a copy of the supplemental reporting instructions to Chapter 7 (Reports), DoD Regulation 5400.7-R, for use in preparing the FY 1998 Annual FOIA Report, for the period October 1, 1997 thru September 30, 1998 (Inclusive). The third is to provide a copy of the latest guidance from Attorney General Janet Reno concerning policy issues and new requirements pertaining to the most significant amendments of the E-FOIA. The Deputy Chief of Staff for Personnel is forwarding a memorandum regarding these changes to all Principal Officials, Heads of Agencies or Offices of the DA Staff and to MACOM Commanders.
2. Enclosed for your information is a copy of the revised DoD Regulation 5400.7-R (encl 1). This regulation provides guidance on the implementation of the FOIA, as amended by the "Electronic Freedom of Information Act (E-FOIA) Amendments of 1996." Until an update of AR 25-55, "The Department of the Army Freedom of Information Act Program," can be published, please follow the policy and procedural guidance in the DoD 5400.7-R. An update to AR 25-55 is expected to be out sometime during the third quarter, FY 98. Please pay particular attention to the changes that are indicated by italics in the DoD regulation. These changes reflect the E-FOIA amendments and other administrative-type changes to the program. We are developing the public guidebook referenced in the DoD regulation and will provide you an information copy in approximately a month. The DoD regulation also is available on the internet at the following address: <http://web7.whs.osd.mil/pdf/foi597.pdf>. The Acrobat Program is needed to view and download this document. This program may be installed by following the instructions at: <http://web7.whs.osd.mil/corres.htm>. Additional copies of this regulation may also be obtained through your local publication channels from the St. Louis Publications Center, St. Louis, MO. Please ensure widest dissemination.
3. Enclosed for your planning purposes is a copy of DoD's supplemental instructions for the first FY report, 1 October 1997 - 30 September 1998 (encl 2). These instructions supplement Chapter 7 (Reports) of this regulation. However, the DoD has advised us that the Department of Justice intends to issue further guidance on the new report in the future and that these instructions may likely change. You will be notified of any future changes as soon as possible.

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SUBJECT: DoD Regulation 5400.7-R, DoD Freedom of Information Act (FOIA) Program,
DoD Supplemental Reporting Instructions, and Guidance from the Attorney General Janet Reno

4. Enclosed for your information is a copy of Attorney General Janet Reno's memorandum, subject: The Freedom of Information Act, dated May 1, 1997 (encl 3). This memorandum, and its five attachments, address the most significant new requirements of the E-FOIA amendments and the timelines. It also provides statements of FOIA policy from President Clinton and from Ms. Reno.

5. The point of contact for this action is Ms. Rose Marie Christensen, COMM: (703) 607-3377, DSN: 327-3377, and FAX: (703) 607-3450. The e-mail address is christensenr@rmppo.belvoir.army.mil. The mailing address is Department of the Army Freedom of Information and Privacy Act; Office, 1725 Jefferson Davis Highway, Suite 201, Arlington, VA 22202-4102.

FOR THE COMMANDER:

3 Encls



EARL M. SIMMS
Brigadier General, USA
The Adjutant General

DISTRIBUTION:

ASSISTANT SECRETARY OF THE ARMY (FINANCIAL MANAGEMENT), ATTN:
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ASSISTANT SECRETARY OF THE ARMY (RESEARCH, DEVELOPMENT AND
ACQUISITION), ATTN: SFAE-IMO

DEPUTY ASSISTANT SECRETARY OF THE ARMY (CIVILIAN PERSONNEL POLICY),
ATTN: SAMR-CP

GENERAL COUNSEL, ATTN: SAGC

ADMINISTRATIVE ASSISTANT TO THE SECRETARY OF THE ARMY, ATTN:
SAAA-RM

DIRECTOR, INFORMATION SYSTEMS FOR COMMAND, CONTROL,
COMMUNICATIONS, AND COMPUTER, ATTN: SAIS-ZA

THE INSPECTOR GENERAL, ATTN: SAIG-ZXR

THE AUDITOR GENERAL, ATTN: SAAG-GC

DEPUTY CHIEF OF STAFF FOR OPERATIONS AND PLANS, ATTN: DAMO-ZXA-A

DEPUTY CHIEF OF STAFF FOR PERSONNEL, ATTN: DAPE-ZXI-IC

DEPUTY CHIEF OF STAFF FOR LOGISTICS, ATTN: DALO-ZXA

(CONT)

SAMPLE LETTER TO CONTRACTOR WHEN FOIA REQUEST RECEIVED FOR ITS INFORMATION

The Army has received a request under the Freedom of Information Act (FOIA) for Contract # _____ for the (on site maintenance of Government owned ADPE Equipment). Our review of the contract reveals that certain contract data supplied by _____ may fall within exemption 4 to the FOIA.

Under this exemption the Army may refuse to disclose trade secrets and commercial or financial information obtained from a source outside the Government and which is privileged or confidential. Commercial or financial information is considered confidential if its disclosure is likely to cause substantial competitive harm to the source of the information.

In order for us to make a determination regarding the release of the contract under consideration the Army must have a detailed justification of the reasons your firm believes the information requested should not be released under Exemption 4 of the FOIA. We believe that you are in a good position to explain the commercial sensitivity of the information contained in the contract which relates to the (confidential or privileged information) from your proposal.

In this regard please provide this office with a specific description concerning how disclosure of (confidential or privileged information) or related information in the contract would cause substantial harm to _____'s present or future competitive position. Some factors you may wish to describe are: the general custom or usage in your business regarding this type of information, the number and position of persons who have, or have had, access to the information, the type and degrees of commercial injury that disclosure would cause and the length of time you feel confidential treatment is warranted. Due to the response time limits imposed on the government in these cases we request that you provide your response by _____. If we have not heard from you by that date we will assume that your firm has no objection to disclosure of the contract in its entirety.

We will carefully consider the justification you provide us and will endeavor to protect your proprietary data to the extent permitted under law. Should we disagree with your position regarding some or all of the information requested, and determine it to be releasable, we will provide you with advance notice of our decision so that you may take whatever steps you consider appropriate to protect your interests.

Contracting Information Commonly Requested
under the Freedom of Information Act (FOIA)

1. This provides a brief review of certain types of contracting information/records that are commonly requested and whether such information is exempt from release.
2. *Contractor award fee, base fee, and G&A percentages.* These data, reflected on the Abstract of Offers, Schedule B, or contract modifications are usually considered confidential commercial information not releasable under FOIA. Disclosure would normally be expected to cause competitive harm to the submitter. However, for very old or obsolete data, where release may cause very little or no competitive harm, release may be appropriate.
3. *Information from unsuccessful offerors.* 10 U.S.C. 2305(g) now prohibits release of contract proposals if those proposals were not incorporated into an ensuing contract.
4. *Unit prices and bid abstracts.* Generally, unit prices are releasable. For sealed bid procurements the information is made public at bid opening. In negotiated procurements, the items, quantities, and any stated unit prices are releasable (See FAR 15.503(b)(iv)). The contractor's award fee, base fee, and G&A percentages on Abstract of Offers, Schedule B, and modifications may be confidential commercial information. It is the contractor's responsibility, however, to fully articulate how release of this information is likely to cause substantial competitive harm.
5. *Bidders Mailing Lists.* Bidders mailing lists are normally releasable before or after award.
6. *Copies of the contract, including technical proposals.* The general rule is that signed contracts are releasable. If the submitter claims confidentiality for all or part of the proposal, the contracting officer should analyze whether Exemption 4 warrants withholding all or part of the proposal.

7. CID Reports, MP Reports, and other documents prepared by other agencies. Refer the request to the appropriate agency and inform the requester of the referral.

8. No record. A "no record" determination should be forwarded to the IDA in the same manner as a recommendation to withhold records. The file should contain a description of the "search methods" used to determine that no records responsive to the request exist.

9. Job Order Contract: Awardees' coefficients (unit and total prices) are releasable. However, disclosure of the individual cost elements are exempt.

10. For additional guidance, local counsel are urged to refer to the Department of Justice's *Freedom of Information Act Guide and Privacy Act Overview*, published annually; their *FOIA Update*; and their web site, at www.usdoj.gov/foia.

RECURRING INFO PLACED ON HOMEPAGE

1. Bid abstract for recently opened invitations for bid and contract price information on recently awarded negotiated contracts (e.g. total contract award including options), and brief descriptions of the work.
2. Significant upcoming recurring procurements, including current contractor, contract number, contract prices, and description.
3. List of IMPAC cardholders
4. Solicitations synopsized: including solicitation number, projected release date, and brief description.
5. Solicitations issued: including solicitation number, release date, date for receipt of proposal or bids, brief description, and mailing lists.

Standard Operating Procedures (SOP)
Filing/Retention of Electronic Mail (Email) Notes

Purpose. Purpose of this SOP is to ensure the capture of essential information in email, necessary to protect the rights and interests of the Army; preserve valuable permanent records; ensure the retention, review and disposal of all other e-mail records in accordance with Army Regulation (AR) 25-400-2, 15 Oct 86, The Modern Army Recordkeeping System (MARKS); and, secure information contained in email notes exempt from public release under the nine exemptions of the Freedom of Information Act.

Background. A change to Chapter 36, 1234, Code of Federal Regulations, dated 27 Sep 95, announced the applicability of email notes to policies for the preservation of federal records.

Scope. This SOP applies to records and information prepared, transmitted and/or received using email systems.

Determining which email notes are records. Email notes that meet one or more of the following criteria must be retained as official records:

- Are related to Department of Defense (DoD) missions or business;

- Are required to be maintained in order to conduct official business and are not duplicated on another media or recordkeeping system;

- Would require retrieval to determine what had been done, or to use it in or with another official action(s);

- Are made or received in the conduct of Government business and are required to be maintained in accordance with Appendix B, AR 25-400-2, MARKS;

- Are evidence of or information reflecting FORSCOM policies, procedures, actions, or decisions.

Definition of records. Records are defined as books, papers, maps, photographs, machine-readable records, or other documentary materials regardless of physical form or characteristics, made or received by an agency of the United States Government under Federal law or in the transaction of public business. Further, these records are preserved by that agency or its legitimate successor as evidence of the organization, functions, policy decisions, procedures, operations or other activities of the Government or because of the informational value of the data in them.

Ensuring an email record is complete. An email record is complete when it includes all attachments, as well as information that identifies the sender, the recipient(s), and the date and time the note or message was sent or received.

Email notes without signiture. Notes, maps, manuals, reports, and photographs are very often without signiture but are considered records data.

Nonrecord data in email or on other media. Non-record copies, normally referred to as working papers, notes, etc., related to the email note or message should be maintained, if their absence would create a gap in the files or impair the logical sequence of essential documentation.

Responsibility for saving email notes. The responsibility for determining what data should be retained as records belongs to both the originator and recipient(s) of the information, using the same criteria in MARKS, now used for paper records.

Storage/archival of email records. The Departments of Defense and Army do not support the establishment of additional recordkeeping systems to store or manage email records. Backup systems created to facilitate restoration of a system or a file are also ill-suited for recordkeeping purposes. Therefore, the following procedures are recommended for email records determined for retention:

While the email note or record relates to an ongoing action or requires frequent access (more than twice a month), maintain the email note or record on-line in email or appropriate software that permits its transmittal, access, and use.

When the email note or record no longer relates to an ongoing action or does not require frequent access, download the record from email to one of the following media:

A software commonly used at the headquarters, i.e., WORD, EXCEL, PowerPoint;

Removable disk(s);

Existing paper filing system, IAW MARKS.

Retention period for email records. The National archives and Records Administration (NARA) requires email records to be maintained IAW the records schedule in MARKS, Appendix B.

Permanent records in email. Records requiring permanent retention, in accordance with MARKS, Appendix B, are transferred to NARA. Until procedures are in place for the retirement of electronic data, these records should be printed to paper and filed with paper records.

Requests for guidance. Requests for guidance or assistance on implementation of this SOP should be directed to Mr. Norman Lambert, HQ FORSCOM Records Manager, telephone 362-3173.